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No. 05-200

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,
Petitioner,

v.

DENISE FINN MCVEIGH, as administratrix of
the Estate of Joseph E. McVeigh,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In our opening brief, we showed – in unison with the United States' position in its *amicus curiae* brief – that federal jurisdiction exists over Empire's complaint on at least two different bases. First, under cases such as *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 23 (1982), a suit for breach of a contract that is contemplated in a federal statute raises a federal claim where Congress intended the contract to be a "creature[ ] of federal law." Here, Empire's suit seeks to enforce the terms of a contract expressly set forth in FEHBA, and all indicia of Congress's intent signal that FEHBA contractual obligations are "federal in nature." *Id.* Second, this case involves the litigation of important programmatic interests of the federal government; as a result, under the framework first established in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), Empire's case is exclusively governed by federal common law and subject to federal jurisdiction.

Respondent refuses even to acknowledge this legal framework. Nowhere does Respondent (or, for that matter, her *amicus curiae*, Julia Cruz) so much as mention *Jackson Transit* or the similar decisions holding that suits to enforce contracts contemplated by federal statutes may raise federal claims. Nor does Respondent address the *Clearfield Trust* rule that matters concerning national federal programs are controlled by federal common law. On the latter point, instead of focusing on the nature of the FEHBA program and the federal interests in it, Respondent asks the Court to search for a specific conflict between the operation of state law and federal policy before adopting federal common law. That inquiry is unnecessary, but in any event here results in the displacement of state law.

What Respondent does address are the provisions in FEHBA permitting suits against the United States and expressly pre-empting state law, seeking to show that they do not apply by their terms to this case. Insofar as those arguments bear on jurisdiction under either *Jackson Transit* or *Clearfield Trust*, Respondent's arguments are illogical and unpersuasive. In the end, Respondent provides no support whatsoever for the odd conclusion that Congress intended state law and state courts to control the reimbursement of federally subsidized health benefits for the federal government's own workforce.

ARGUMENT

I. BECAUSE CONGRESS INTENDED THAT SUITS FOR BREACH OF FEHBA CONTRACTS WOULD RAISE FEDERAL CLAIMS, EMPIRE'S COMPLAINT POSES A FEDERAL QUESTION

A. Section 8912 Evinces a Congressional Intent to Treat FEHBA Contract Claims as Federal Claims

The central question under *Jackson Transit* and similar cases is whether Congress intended a claim for breach of the contract that is contemplated by a federal statute to be a federal claim or, alternatively, a state claim. Respondent focuses first and foremost on 5 U.S.C. § 8912, the provision in FEHBA that states: "The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter."

In essence, Respondent argues that § 8912 must be read as a statement by Congress not just that suits against the United States should be brought in the federal courts, but also that federal jurisdiction is prohibited over every other possible lawsuit stemming from FEHBA. Under Respondent's theory, the prohibition would have to extend to contract claims that Congress surely expected would be actionable somewhere. *See Jackson Transit*, 457 U.S. at 20 ("it is reasonable to conclude

that Congress expected the . . . agreement, like ordinary contracts, to be enforceable by private suit upon a breach").

Section 8912 cannot bear the weight Respondent places on it. Congress intended § 8912 simply to waive the sovereign immunity otherwise applicable for suits against the United States for monetary relief in the district courts. Under 28 U.S.C. § 1346(a)(2), a litigant can sue the United States in a district court for no more than $10,000; all suits above that amount against the United States must be brought in the Court of Federal Claims, formerly known as the Claims Court. Section 8912 expanded that jurisdiction, ensuring that lawsuits for amounts greater than $10,000 could be brought in convenient district court venues across the country, rather than solely in the Court of Federal Claims located in Washington, D.C.

The text of § 8912 substantiates this limited purpose for the provision. It speaks of district court jurisdiction "concurrent with the United States Court of Federal Claims," evincing on its face a desire to address jurisdictional matters affecting the latter court. Likewise, the legislative history supports this reading of § 8912. Section 8912 replicates verbatim a provision earlier enacted in the Federal Employees Group Life Insurance Act ("FEGLI"), 5 U.S.C. § 8715. With respect to that provision, Congress noted: "[The] Section . . . would clarify the rights of claimants who may wish to make the United States a party to a court action involving a claim under the program. This section would extend the jurisdiction of the United States district courts above the $10,000 limitation now in effect." S. Rep. No. 83-1654, at 4-5 (1954). Commenting on § 8912 in light of its FEGLI counterpart, the Claims Court itself remarked that both provisions were "enacted merely to enable making the United States a party to a court action in a district court, which would otherwise have been barred by the $10,000 limitation on suits against the United States in such court. 28 U.S.C. § 1346(b)." *Rosano v. United States*, 9 Cl. Ct. 137, 144 (1985), *aff'd*, 800 F.2d 1126 (Fed. Cir. 1986).

Indeed, if anything, § 8912 supports, not detracts from, federal jurisdiction over Empire's claim to enforce the FEHBA contract. As is evident from the text and history of § 8912, Congress enacted it in order to alter the *usual* jurisdictional rules that it expected would otherwise have governed district court jurisdiction (including, in particular, the $10,000 limitation in suits against the United States). The federal question jurisdiction that Empire invokes is another typical rule governing the federal courts' jurisdiction. It follows that, with Congress believing that the usual federal jurisdictional principles operate under FEHBA and therefore that express statutory change would be required to alter that usual framework (such as in enacting § 8912), Congress anticipated unfettered operation of the federal courts' federal question jurisdiction.

This Court's own precedent also negates Respondent's argument. In *Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002), the Court considered whether the federal courts had federal question jurisdiction over Verizon's suit alleging that a state utility commission's order violated federal communications laws and an order of the Federal Communications Commission. The lower courts rejected jurisdiction under 28 U.S.C. § 1331, and the state commission sought affirmance on the ground that Congress's grant of federal jurisdiction in 47 U.S.C. § 252(e)(6) to review certain determinations of state commissions precluded jurisdiction over other matters.

Rejecting the state commission's argument, the Court said that "Verizon's claim . . . falls within 28 U.S.C. § 1331's general grant of jurisdiction, and contrary to the Fourth Circuit's conclusion, nothing in 47 U.S.C. § 252(e)(6) purports to strip this jurisdiction." *Verizon*, 535 U.S. at 643. The section "merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under § 1331." *Id.* (emphasis in original). "'The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.'" *Id.* at

643-44 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)) (citation omitted). In *Verizon*, there was "nothing more than that mere fact," such as the creation of special review mechanisms or standards, to suggest that Congress wanted the jurisdiction that it did create to be exclusive. *Id.* at 644.

Just as in *Verizon*, the grant of jurisdiction over one category of claims in FEHBA (*i.e.*, actions against the United States) "does not *divest* the district courts of their authority under 28 U.S.C. § 1331 to review [other matters] for compliance with federal law." *Verizon*, 535 U.S. at 642 (emphasis in original). Nor does § 8912 create a "distinctive review mechanism" or speak to the available "substantive relief" (*id.* at 644). In fact, litigants invoking § 8912 jurisdiction in suing the United States must look to other statutes for their cause of action, such as the Administrative Procedure Act, 5 U.S.C. § 706.

Respondent cites this Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), as somehow supportive of her construction of § 8912. It is not. In *Finley*, the Court rejected pendent-party jurisdiction in federal actions brought against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). The FTCA prescribes that the district courts shall have "exclusive jurisdiction of civil actions on claims against the United States." 28 U.S.C. § 1346(b). All that the Court held was "that a grant of jurisdiction over claims involving particular parties does not *itself* confer jurisdiction over additional claims by or against different parties." 490 U.S. at 556 (emphasis added). Thus, Congress's allowance for suits against the United States would not permit "added claims involv[ing] added parties over whom no independent basis of jurisdiction exists." *Id.* at 551. Here, Empire is not invoking federal jurisdiction under § 8912; it agrees that that section permits jurisdiction over claims "against the United States and no one else." *Finley*, 490 U.S. at 552. Instead, Empire bases its claim on federal question jurisdiction, "an independent jurisdictional base." *Id.* at 547.

In sum, there is no basis in the text or history of § 8912 or in this Court's precedents for reading § 8912 as an iron-clad barrier to federal jurisdiction except in suits against the United States. Even the court of appeals below rejected Respondent's § 8912 argument. Pet. App. 14a n.7. This Court should do the same.

B. FEHBA's Preemption Provision Reinforces that Congress Expected Federal Law to Control Reimbursement Disputes

Respondent then addresses FEHBA's preemption provision, but none of her arguments shows even remotely that the section evidences any intent of Congress to make FEHBA contracts creatures of state law. As an initial matter, even if Respondent were correct that reimbursement matters do not fall within the scope of FEHBA's preemption clause, 5 U.S.C. § 8902(m)(1), that would not prove Congress intended state law to control the area of FEHBA reimbursement. The *Jackson Transit* inquiry is not coextensive with the preemption inquiry; rather, it asks whether Congress intended FEHBA contractual obligations to be federal in nature. That Congress was moved to enact a broad preemption provision in order expressly to limit the application of state law is a powerful indication that Congress saw state law as particularly ill-suited to matters touching on FEHBA, whether or not the preemption provision applies by its very terms to a particular controversy.

In any event, the preemption provision does cover reimbursement. Respondent and her *amicus* Julia Cruz assert that the preemption provision is inapplicable because the provision gives the "terms of [FEHBA] contract[s]" preemptive power , and the Statement of Benefits – the document containing the enrollee's reimbursement obligations – purportedly is not a contractual document. Instead, they say (each time without any record or other citation) that it is an instrument "Blue Cross prepared and issued to FEHBA plan enrollees." Br. for *Amicus*

Curiae Julia Cruz ("Cruz Br.") at 10; *see id.* at 20 n.9, 22, 25; Resp. Br. at 14, 39.

This unsupported assertion is belied by both the statute and the contract. FEHBA itself provides that "*[e]ach contract under this chapter shall contain* a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as *the Office* considers necessary or desirable." 5 U.S.C. § 8902(d) (emphasis added). This statutory provision alone shows that the Statement of Benefits is part of the contract and that OPM has final authority for benefits terms and exclusions. Consistent with the statutory requirement that it "shall contain a statement of benefits," the OPM-BCBSA contract specifically adopts and incorporates the Statement of Benefits and its reimbursement terms. *See* Pet. Br. at 17 (citing §§ 2.2 & 2.5 of the OPM-BCBSA contract). Additionally, given that the statute requires the Statement of Benefits to contain terms that "*the Office* considers necessary and desirable," the courts have correctly rejected the notion that the document is something that the carrier "author[s] and issue[s]" (Cruz Br. at 26) and instead have recognized that the "[b]enefits provisions are rules under the Administrative Procedure Act ["APA"], 5 U.S.C. § 551(4)." *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 80 (4th Cir. 1993); *see also Doe v. Devine*, 703 F. 2d 1319, 1321, 1326 (D.C. Cir. 1983) (Ruth B. Ginsburg, J.) (applying APA's arbitrary-and-capricious test, which governs review of agency rules and adjudications, to a challenge to benefit levels set in the Service Benefit Plan's Statement of Benefits).

Amicus Cruz further argues that reimbursement terms are not part of the contract (and thus cannot preempt state law under § 8902(m)(1)) because the OPM-BCBSA contract addresses "subrogation" but is supposedly "silent on reimbursement." Cruz Br. at 20 n.9. First of all, because reimbursement indisputably is addressed in the Statement of Benefits, and because the Statement of Benefits is part of the contract, it is incorrect

to say that the OPM-BCBSA contract does not address reimbursement, even if the main contractual document were silent on it. But the OPM-BCBSA contract also expressly addresses reimbursement elsewhere. *See* J.A. 95 ("Subrogation" section states: "The carrier may also recover directly from the Member all amounts received by the Member by suit, settlement, or otherwise from any third party or its insurer"); *id.* at 108, 125.[1]

Respondent next asserts that reimbursement falls outside of the preemption clause because the section allegedly "only provides for preemption when the issue involves 'coverage or benefits,' not for reimbursement claims." Resp. Br. at 9. Respondent then interprets "coverage or benefits" as encompassing only "benefits consisting of medical care." *Id.* Respondent crafts her argument by repeatedly omitting key statutory language. When quoting § 8902(m)(1), Respondent states that it "provides in pertinent part that the 'terms of any contract under this chapter *which relate to the nature, provision, or extent of coverage or benefits* . . . shall supersede and preempt any State or local law . . . .'" Resp. Br. at 8 (emphasis in Resp. Br.); *see also id.* at 4, 9, 12, 13, 18. The omitted parenthetical language clarifies that the term "benefits" encompasses "payments with respect to benefits," which plainly includes reimbursement payments, given that reimbursement is the return to the Plan of previous payments of benefits. 5 U.S.C. § 8902(m)(1); *see, e.g.*, *Blue Cross & Blue Shield of Ill. v. Cruz*, 396 F.3d 793, 798 (7th Cir. 2005) ("An enrollee's

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[1] The OPM-BCBSA contract contains two sections on subrogation. One is § 2.5 (J.A. 92, 118-19); the other is among the "Special Provisions" that relate to the Service Benefit Plan individually as opposed to being included necessarily in every FEHBA plan's contract. J.A. 95, 108, 125. In these various provisions, the contract uses "subrogation" broadly to include traditional subrogation (*i.e.*, the carrier stepping into the shoes of the enrollee to sue the third party) and reimbursement. This Court has similarly used the term "subrogation" broadly to encompass reimbursement. *See FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990).

reimbursement obligation after recovery from a third party affects the amount of net benefits received from the carrier, so it certainly satisfies the literal definition of being 'related to' the extent of coverage or benefits"), *petition for cert. pending*, No. 04-1657.

In a similar vein, *amicus* Cruz contends that reimbursement cannot involve benefits or coverage because "carrier coverage and benefit determinations, and payments with respect to those, are completed long before reimbursements are asserted and recovered." Cruz Br. at 11. The *amicus* overlooks the fact that benefits payments for injuries caused by third parties are, at the start, expressly *conditioned* on the enrollee's agreement to comply with the reimbursement provision. *See* J.A. 90, 92, 95, 165. Consequently, the benefit payment cannot be separated from the reimbursement obligation.

After seeking, unsuccessfully, to show that reimbursement falls outside of the literal terms of the preemption section, Respondent and the *amicus* try to prove that the legislative history to the original preemption section illustrates a Congressional desire to extend the preemption clause solely to state laws that mandate specific benefits. Resp. Br. at 13; Cruz Br. at 13-16. As we showed at length in our opening brief, the legislative record from the original preemption clause is rife with suggestions that Congress, with the wording it adopted, intended a broad preemption that would preserve only certain state licensing, reserve, and tax laws. Pet. Br. at 22, 26.[2]

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[2] *Amicus* Cruz argues that her crabbed view of the original preemption clause remains in force even today because the 1998 amendment effected just "technical" changes. Cruz Br. at 15. That assertion is contradicted both by Congress's statement that the amendment "broaden[ed]" the section (H.R. Rep. No. 105-374, at 9 (1997) (J.A. 24)) and by President Clinton's "objection," when he signed the 1998 amendment, to the "provision in this legislation that appears to expand preemption of State law remedies for FEHBP enrollees." Stmt. on Signing the Federal Employees Health Care Protection Act of 1998, 34 Weekly Comp. Pres. Doc. 2108 (Oct. 23, 1998).

C. Respondent's Analogies to Other Statutes Do Not Show a Congressional Intent in FEHBA Favoring State Law

Respondent reviews the language and case law surrounding several other federal statutes. One is the Federal Tort Claims Act, which we have already shown does not undermine federal jurisdiction over Empire's complaint. *See supra* p. 5. Another is ERISA. Respondent apparently believes that ERISA's reticulated enforcement scheme, with several vehicles for federal jurisdiction, suggests that Congress – not having created a similar enforcement scheme in FEHBA – expected federal jurisdiction over FEHBA matters to be strictly limited or nonexistent.

On this point, the ERISA analogy is inapt. When Congress enacted ERISA (14 years after FEHBA), it did so against the historical backdrop of the states having regulated private pensions and health benefits. *See Malone v. White Motor Corp.*, 435 U.S. 497, 507-14 (1978). Congress, accordingly, enacted a detailed enforcement scheme, since it was upending state law. In contrast, prior to FEHBA, there had been no program for health benefits for federal employees, and Congress logically had no similar necessity for comprehensively detailing the expected federal remedies. Indeed, since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it had been the rule that the states may not impair the operations and instrumentalities of the federal government, so that Congress would have no reason whatsoever to contemplate that it had expressly to delineate applicable federal remedies in order to ensure that state law would not control an incident of federal operations, such as federal employment.

Respondent also cites the Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3), and this Court's interpretation of it in *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990), as contradicting the position that "Congress had intended for FEHBA

jurisdiction to be 'exclusive.'" Resp. Br. at 15. The argument is a red herring, because Empire has never asserted that the federal courts have exclusive jurisdiction over FEHBA reimbursement matters, only that it – as plaintiff – could elect to bring a reimbursement case in federal court under 28 U.S.C. § 1331. Similarly, it is of no relevance that Congress elsewhere may have provided by statute for reimbursement with respect to veterans' and social security benefits. *See* Resp. Br. at 13. Congress in FEHBA left to OPM the task of determining the specific benefits terms to be contained in FEHBA contracts, *see* 5 U.S.C. § 8902(d); *see also id.* § 8913 (delegating to OPM the authority to prescribe all necessary regulations to carry out FEHBA), and OPM has chosen to include a reimbursement obligation. That this obligation is contained in a contract contemplated in a federal statute (and can even be considered an agency rule, *see supra* p. 7), is sufficient – under *Jackson Transit* – for a federal claim.

II. EMPIRE'S COMPLAINT RAISES A FEDERAL CLAIM UNDER *CLEARFIELD TRUST* AND ITS PROGENY

Even aside from the *Jackson Transit* analysis, Empire's complaint also raises a federal claim under *Clearfield Trust* and its progeny. *Clearfield Trust* establishes a two-step framework for determining the role, if any, of state law in cases touching on national federal programs and government contracts – (1) whether the claim involves sufficiently weighty federal interests that federal common law should govern; and (2) whether that federal common law should provide an independent federal rule of decision or instead incorporate state law to some extent. As shown in our opening brief, because federal common law governs the area of FEHBA reimbursement, and because a claim founded on federal common law, in turn, raises a federal question, *Clearfield Trust* provides an additional, independent basis for the conclusion that Empire's complaint raises a federal claim. Pet. Br. at 32-44.

A. The First *Clearfield Trust* Inquiry Is Sufficient to Establish Federal Jurisdiction Here

The first *Clearfield Trust* inquiry goes directly to the question of federal jurisdiction. *See* Pet. Br. at 40-41. If Empire's claim arises under federal common law, then federal court jurisdiction exists under 28 U.S.C. § 1331, regardless of whether state law principles contribute to the content of that federal law. In providing for federal jurisdiction in a variety of circumstances, Congress has recognized that there are "advantages thought to be inherent in a federal forum" that should be available to litigants in appropriate circumstances. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367 (2005). Thus, it is a point of emphasis in many of the *Clearfield Trust* line of cases that "federal courts must fashion the governing rules." *Nat'l Metro. Bank v. United States*, 323 U.S. 454, 456 (1945); *see, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (the claim involved "'a federal right, so that the courts of the United States may formulate a rule of decision'") (quoting Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964)); *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 310 (1947) (invoking the "federal judicial power to deal with . . . essentially federal matters" before determining that "state law should not be selected as the federal rule").

Respondent objects that there is no specific evidence that "state adjudication" will adversely affect the United States' interests here. Resp. Br. at 21. But a determination that federal jurisdiction is appropriate does not require any specific negative conclusions concerning state court jurisdiction. Rather, embedded in the *Clearfield Trust* approach is the recognition that factors such as the federal courts' "experience" with and "solicitude" for federal issues and federal programmatic interests (*Grable*, 125 S. Ct. at 2367) makes those courts the proper forum for resolving disputes that significantly affect those interests. *See Merrell Dow Pharms., Inc. v. Thompson*, 478

U.S. 804, 814 & n.12 (1986) (the "*nature* of the federal interest at stake" determines whether a case is "the kind of adjudication for which [federal] jurisdiction would serve congressional purposes and the federal system") (emphasis added).

As explained in our opening brief (at 38 n.3), in cases where the first *Clearfield Trust* inquiry "is of only theoretical interest" because federal jurisdiction exists in any event, the Court on occasion has addressed only the question whether the rule of decision displaces state law. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 n.3 (1988); *United States v. Yazell*, 382 U.S. 341, 357 (1966). Respondent relies heavily on these cases (*see* Resp. Br. 19-20, 31) and, perhaps for that reason, largely ignores the possibility that federal question jurisdiction could exist here without displacing state law. In other cases, however, the Court has made clear that it continues to adhere to the two-inquiry approach of *Clearfield Trust*. Hence, in *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991), the Court found that the claim clearly was "governed by *federal* law," but held that the federal courts should incorporate state law into the federal common law rule of decision. *Id.* at 97-98 (emphasis added).

Because Empire's "activities '[arise] from and [bear] heavily upon a federal . . . program,'" its claim is governed by federal law and therefore falls within § 1331's federal question jurisdiction. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (quoting *Little Lake Misere*, 412 U.S. at 592-93) (alterations and ellipsis in *Kimbell Foods*). This federal jurisdiction would exist even if Respondent were correct that, as in *Kamen* and *Kimbell Foods*, state law generally should not be displaced as the rule of decision.

B. In Any Event, State Law Does Not Apply Under the Second *Clearfield Trust* Inquiry

There nevertheless is no place for state law here under the second *Clearfield Trust* inquiry. Congress has determined that uniform rules should govern benefits payments under FEHBA,

and incorporating the varied state law rules applicable to reimbursement actions would subvert that determination.

Respondent, echoing the court of appeals, contends that federal law cannot apply because Empire has not identified a specific conflict between state law and federal interests. *See* Resp. Br. 21-25. That contention fails both because there is no such conflict requirement applicable here and, in any case, there is a clear conflict between the application of state rules governing reimbursement and the FEHBA program's interest in uniform enforcement of contract provisions.

Respondent's requirement of a specific conflict purports to derive from language in *Boyle* and *O'Melveny*, where the Court signaled that federal common law will displace state rules when there is a "significant conflict" between the operation of state law and federal policy. *Boyle*, 487 U.S. at 507-08; *O'Melveny*, 512 U.S. at 87. As already noted (Pet. Br. at 41-43), the "significant conflict" language in these decisions did not profess to set forth a test for the application of federal common law when Congress has already expressly stated the need for uniformity in a federal program by including a pre-emption provision in the statute. *See O'Melveny*, 512 U.S. at 85 ("an explicit federal statutory provision" answers the question of displacement of state law); *Boyle*, 487 U.S. at 504 (state law is displaced when there is "a clear statutory prescription" for "federal pre-emption of state law"). Similarly, in *Atherton v. FDIC*, 519 U.S. 213 (1997), the Court discussed the need for a "significant conflict" only after assuming that the statute did not suggest displacement of state law. *Id.* at 218; *see id.* at 217 ("setting the federal 'gross negligence' statute to the side"). In sharp contrast to this case, the relevant statute there contained a "saving clause that . . . preserves the applicability of stricter state standards." *Id.* at 227. Here, the statute contains a pre-emption clause explicitly displacing state law – one that Congress amended to remove language conditioning preemption on a conflict with state law. *See* Pet. Br. at 24, 41-42.

Likewise, this case does not involve a "generalized plea[ ] for uniformity" of the sort previously rejected by the Court in cases finding that the federal interest was equally served by having state law rules apply. *See O'Melveny*, 512 U.S. at 88; *Kimbell Foods*, 440 U.S. at 730. Those cases do not question that a genuine need for uniformity is grounds for application of federal common law; they merely recognize that "[t]o invoke the concept of 'uniformity,' however, is not to prove its need." *Atherton*, 519 U.S. at 220. But Congress, in FEHBA, specifically determined that there is a need for uniformity. FEHBA provides that all contract terms relating to "payments with respect to benefits" shall preempt state law (5 U.S.C. § 8902(m)(1)), and the legislative history identifies the desire for FEHBA plans to offer "uniform benefits" nationwide as the reason for the preemption clause. H.R. Rep. No. 105-374, at 9 (1997) (J.A. 24); *see also* S. Rep. No. 95-903, at 2 (1978) (Congress sought "to establish uniformity in benefits"). Following from Congress's direction, the OPM-BCBSA contract requires that the carrier "shall subrogate under a single, nationwide policy to ensure equitable and consistent treatment for all Members." J.A. 95, 103, 125.

Congress's documented desire for uniformity is at risk in this case. State laws vary widely with respect to regulation of reimbursement actions like the one involved here. Some states would prohibit such actions altogether, while others would impose no special obstacles to enforcement of a contractual reimbursement provision. *See* Patricia G. Tobin, *The Rawlings & Assocs. National Subrogation Law Manual 1998*, at 51-53 (1997).[3] Thus, there would be a serious conflict with the FE-

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[3] Arizona, Connecticut, Kansas, Missouri, North Carolina, Pennsylvania, and Virginia generally prohibit enforcement of reimbursement clauses concerning medical expenses. *See* Tobin, *supra*, at 89-90, 111-12, 171-72, 229-30, 279-81, 309-11, 353-54. New York generally allows subrogation and reimbursement. *Id.* at 274-75.

HBA program if state law generally were to govern these actions (even if there were no New York state law rule that would prevent enforcement of the FEHBA government contract in this case). Enrollees in some jurisdictions (those where reimbursement is prohibited or limited) would receive higher net benefits payments than enrollees in other jurisdictions (those where reimbursement is unhampered), despite paying the same premium, thereby destroying the uniformity in benefits that Congress sought to ensure. In short, even if a specific conflict with federal interests were required for the application of a federal rule of decision, that requirement is satisfied in the context of a suit to enforce the reimbursement clause of a FEHBA contract.

C. It Makes No Difference That the United States Is Not a Party to the Action

Respondent suggests that the *Clearfield Trust* line of decisions is inapposite because, in those cases, "the United States was itself either a plaintiff or a defendant, with its rights and obligations directly at stake." Resp. Br. 27. But the presence of the United States as a party to the litigation is not a prerequisite to the application of federal common law. *See Boyle*, 487 U.S. at 504, 511-13 (applying federal common law defense in suit between private parties); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985) (power of Indian tribe); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (nuisance action). Similarly, in *Little Lake Misere*, 412 U.S. at 592-94, the Court focused on the regulatory program and the status of the United States as a party *to the contract* at issue, but its status as a party to the lawsuit played no role in the Court's reasoning. Denomination of the United States as a party should particularly be of no moment in a case like this, where a private entity (*i.e.*, Empire) brings the suit on behalf of the government and the relief inures to the government's, not the private party's, benefit. *See* Pet. Br. at 39.

Also instructive on this point are the decisions of the courts of appeals consistently recognizing that private-party suits to enforce flood insurance contracts are governed by federal law and heard in federal court based on federal question jurisdiction. *E.g.*, *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002) ("federal common law *alone* governs the interpretation of insurance policies issued pursuant to the [flood insurance program]") (emphasis added); *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 681-82 (7th Cir. 2001) (§ 1331 jurisdiction exists when "the federal interest in a controversy is so dominant that federal law applies . . . – even if the national government is not a party"); *Newton v. Capital Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (flood insurance "contracts are interpreted using principles of federal common law rather than state contract law"). As Judge Easterbrook explained for the Seventh Circuit, "[t]ypically the United States is a party to disputes that call for federal law under the approach of *Clearfield Trust*. But there is no reason to view that condition as a necessity," especially if "a judgment against [the private party] and a judgment against [the government] have identical effects: [the government] pays." *Downey*, 266 F.3d at 681. The principle should be the same here, given that – regardless of whether Empire or the United States is the plaintiff – the government gains from the relief.

III. THERE ARE NO PUBLIC POLICY ADVANTAGES TO EXCLUSIVE STATE COURT JURISDICTION IN THIS SETTING

Respondent expends much energy extolling the advantages of exclusive state court jurisdiction over FEHBA reimbursement. Resp. Br. at 34-38. That effort is misguided. Insofar as the Court delves into policy considerations, they all favor strongly federal question jurisdiction.

For instance, Respondent erroneously maintains that reimbursement can quickly and efficiently be determined in the state courts in conjunction with the underlying tort suit against

the third party. However, given the many anti-subrogation laws prevalent under state law, resort to the state courts will likely devolve in many cases into disputes over the extent of the operation of state law. Tellingly, in this case, where the proceedings had not progressed beyond the earliest stages, Respondent had already invoked a New York statute of limitations designed to limit subrogation. *See* 2d Cir. App. A824. The prospect is that FEHBA carriers, if left to the state courts, will face heavy litigation burdens in order to enforce plan terms.

The ready availability of federal jurisdiction, in contrast, *expedites* reimbursement. The potential of a federal lawsuit, where the contract terms and other federal law straightforwardly control, would deter enrollees seeking to avoid reimbursement obligations. As a result, litigation might never even materialize in the first place. The exact opposite dynamic would exist if there were exclusively state court jurisdiction: enrollees would be empowered to seek to avoid the contract terms through the application of potentially hostile state law.

Moreover, as the *Cruz* litigation (part of which is pending on petition for certiorari currently in this Court (No. 04-1657)) shows, only a federal forum can guarantee that all of the necessary parties will be present in some reimbursement disputes. Cruz has pending in the state court in Illinois a suit in which she endeavors to avoid her full reimbursement obligation by applying Illinois law to require an automatic, pro-rata reduction for attorney fees she incurred to obtain the third-party recovery. Application of Illinois' automatic-reduction rule would negate the Service Benefit Plan's terms, which permit no reductions unless the carrier in its discretion approves them. J.A. 132, 153. Cruz's effort to nullify the Plan's terms implicates OPM's interests, since it is responsible for selecting the Plan's provisions. In refusing to abstain from exercising jurisdiction in the companion case in the federal courts (now pending here) in favor of the state court action, the Seventh Circuit said:

> The state court action will not adequately protect Blue Cross's and Blue Cross Association's interests, in part because Cruz's state court action seeks to declare illegal the Service Benefit Plan terms regarding subrogation that OPM promulgated. OPM would be unable to participate as a party in a state court suit under 5 U.S.C. § 8912. Resolving the case in federal court would eliminate this potential problem because it would allow OPM to participate in the event that Cruz raises the legality of the contract subrogation provision.

Blue Cross & Blue Shield of Ill. , Inc. v. Cruz, 396 F.3d 793, 801 (7th Cir. 2005), *petition for cert. pending*, No. 04-1657. In every case in state court in which the enrollee seeks to override the Plan's terms with state law, sovereign immunity principles would prevent the real party in interest – the United States – from being present. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration . . . or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.") (citations omitted).

Finally, Respondent contends that federal jurisdiction would harm "the persons the statute was meant to benefit, namely federal employees." Resp. Br. at 36. That contention is mistaken on two grounds. First, the statute was not intended just to protect federal employees and certainly not particularly to protect individual employees obtaining tort recoveries; it was also designed to promote *the government's* interest in attracting the most capable workforce at the lowest possible cost to the government. *See* Br. for the U.S. as *Amicus Curiae* at 16; *Doe v. Devine*, 703 F.2d 1319, 1329 (D.C. Cir. 1983). That interest is furthered by facilitating enforcement of contract provisions that would keep premium costs down. Second, federal employees as a whole benefit from a straightforward federal remedy and forum that provides uniform benefits for all enrol-

lees and avoids costly state court litigation that drains Plan resources. And there are many checks in the system designed to protect federal employees from any arbitrary or unfair conduct in the reimbursement context. For instance, the enrollee, in the federal action, can raise any defenses that the contract terms would permit. Furthermore, OPM retains full authority to police carrier conduct. *See* 5 U.S.C. § 8902(e) (OPM's authority over carrier conduct); *id.* § 8910 (OPM's audit authority); 2d Cir. App. A23 (OPM's procedures to assure quality assurance); 48 C.F.R. §§ 1609.7001, 1646.201 (same); *see generally Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-52 (2001) (state law remedy preempted by FDA's policing authority).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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